

1 Plaintiff alleged disability due to anxiety, panic attacks, learning
2 disability, and back problems, with an onset date of November 1,
3 2001. (Tr. 71, 85.) On reconsideration, Plaintiff alleged anxiety,
4 depression, angina attacks and agoraphobia as disabling impairments.
5 (Tr. 45, 47.) Benefits were denied initially and on
6 reconsideration. (Tr. 47.) Plaintiff requested a hearing before
7 an administrative law judge (ALJ), which was held before ALJ Mary
8 Reed on April 19, 2004. (Tr. 547-634.) Plaintiff, who was
9 represented by counsel, testified. Medical expert R. Thomas
10 McKnight, Ph.D., and vocational expert Dennis Dexter also testified.
11 (Tr. 547.) The ALJ denied benefits and the Appeals Council denied
12 review. (Tr. 15-29, 9-11.) The instant matter is before this
13 court pursuant to 42 U.S.C. § 405(g).

14 **STATEMENT OF THE CASE**

15 The facts of the case are set forth in detail in the transcript
16 of proceedings, and are briefly summarized here. At the time of the
17 hearing, Plaintiff was 42 years old and had an eighth grade
18 education. He testified that he was in special education during
19 school. (Tr. 576-77.) He had two children who did not live with
20 him and he was not married. (Tr. 271, 577.) He had past relevant
21 work as a landscape laborer, kitchen food assembler, janitor and
22 construction worker. (Tr. 27, 102-09, 624-25.) He had a history of
23 chronic alcohol abuse, including inpatient and outpatient treatment
24 and alcohol-related convictions. (Tr. 472-79, 485.)

25 **ADMINISTRATIVE DECISION**

26 At step one, ALJ Reed found Plaintiff had not engaged in
27 substantial gainful activity during the relevant time. (Tr. 19.)

1 At step two, she found Plaintiff had severe impairments of alcohol
2 addiction and borderline intellectual functioning ("BIF"). (Tr.
3 23.) At step three, she determined these impairments met the
4 requirements of section 12.09 (substance addiction) and 12.05
5 (mental retardation) of 20 C.F.R., Appendix 1, Subpart P,
6 Regulations No. 4 ("Listings"). She found drug and alcohol abuse a
7 contributing factor material to the determination of disability at
8 step three. (Tr. 28.) She then considered BIF without drug and
9 alcohol abuse, and found it was a severe impairment, which "causes
10 mild restriction on activities of daily living; moderate limitations
11 in social function and the ability to maintain concentration,
12 persistence or pace; and no episodes of decompensation each of
13 extended duration." (Tr. 24.) Thus, the ALJ concluded the BIF
14 impairment, absent alcohol addiction, did not meet or equal the
15 Listings. The ALJ found Plaintiff's allegations not totally
16 credible. (Tr. 25, 28.) At step four, she considered Plaintiff's
17 BIF without substance addiction and determined Plaintiff had a
18 residual functional capacity (RFC) of no exertional limitations and
19 the following non-exertional limitations: he was limited to simple
20 repetitive tasks that do not require reading, math and writing; he
21 needed instructions repeated to him several times when given new
22 tasks or work changes; and he should have no interaction with the
23 public. (Tr. 27, 28.) The ALJ found Plaintiff, absent the effects
24 of alcohol addiction, could perform his past relevant work as
25 janitor, construction worker and landscape laborer, and was,
26 therefore, not under a "disability" as defined by the Social
27 Security Act. (Id.)

28

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other

1 kind of substantial gainful work which exists in the
2 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
3 the definition of disability consists of both medical and
4 vocational components.

5 In evaluating whether a claimant suffers from a
6 disability, an ALJ must apply a five-step sequential
7 inquiry addressing both components of the definition,
8 until a question is answered affirmatively or negatively
9 in such a way that an ultimate determination can be made.
10 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
11 claimant bears the burden of proving that [s]he is
12 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
13 1999). This requires the presentation of "complete and
14 detailed objective medical reports of h[is] condition from
15 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
16 404.1512(a)-(b), 404.1513(d)).

17 It is the role of the trier of fact, not this court, to resolve
18 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
19 supports more than one rational interpretation, the court may not
20 substitute its judgment for that of the Commissioner. *Tackett*, 180
21 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
22 Nevertheless, a decision supported by substantial evidence will
23 still be set aside if the proper legal standards were not applied in
24 weighing the evidence and making the decision. *Browner v. Secretary*
25 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
26 there is substantial evidence to support the administrative
27 findings, or if there is conflicting evidence that will support a
28 finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

24 ISSUES

25 The question is whether the ALJ's decision is supported by
26 substantial evidence and free of legal error. Plaintiff argues the
27 ALJ erred in finding Plaintiff's alcohol abuse was a contributing
28

1 factor material to his impairments. (Ct. Rec. 13 at 11, 13.)

2 **DISCUSSION**

3 **A. Steps Two and Three: Listing 12.05 and 12.09.**

4 Defendant concedes the ALJ erred at step two and three when she
5 erroneously found Plaintiff had severe impairments which met the
6 Listings for substance addiction (12.09) and mental retardation
7 (12.05). (Ct. Rec. 16 at 6 n.3; Tr. 23.) This legal error requires
8 remand as it taints the ALJ's sequential evaluation as required by
9 20 C.F.R. §§ 404.1535, 416.935¹ and *Bustamante v. Massanari*, 262 F.3d
10 949, 955 (9th Cir. 2001).

11 Section 12.00 of the Listings states in relevant part:

12 The structure of the listing for substance addiction
13 disorders, 12.09, is also different from that for the
14 other mental disorder listings. Listing 12.09 is
15 structured as a reference listing; that is, it will only
16 serve to indicate which of the other listed mental or
17 physical impairments must be used to evaluate the
18 behavioral or physical changes resulting from regular use
19 of addictive substances.

20 20 C.F.R. Part 404, Subpt. P, App. 1, Section 12.00A.

21 Section 12.09 (*Substance Addiction Disorders*) provides:

22 Behavioral changes or physical changes associated with the
23 regular use of substances that affect the central nervous
24 system.

25 The required level of severity for these disorders is met
26 when the requirements in any one of the following (A
27 through I) are satisfied.

28 A. Organic mental disorders. Evaluate under 12.02.

29 ¹ If there is evidence of substance abuse and the individual
30 succeeds in proving he is disabled, the Commissioner must determine
31 whether the drug or alcohol abuse is material to the determination
32 of disability. 20 C.F.R. §§ 404.1535, 416.935.

- B. Depressive disorders. Evaluate under 12.04.
- C. Anxiety disorders. Evaluate under 12.06.
- D. Personality disorders. Evaluate under 12.08.
- E. Eperipheral neuropathies. Evaluate under 11.14.
- F. Liver damage. Evaluate under 5.05.
- G. Gastritis. Evaluate under 5.04.
- H. Pancreatitis. Evaluate under 5.08
- I. Seizures. Evaluate under 11.02 or 11.03.

20 C.F.R. Part 404, Subpt. P, App. 1, Section 12.09.

The ALJ found Plaintiff had a severe impairment of mental retardation (12.05), which does not satisfy the requirements for 12.09. Further, this finding is not supported by substantial evidence. To meet the Listing under 12.05, Plaintiff must test a full scale IQ of no higher than 70. 20 C.F.R. Part 404, Subpt. P, App. 1, Section 12.05(B)(C). Plaintiff consistently showed a full scale IQ of 72 or higher. (Tr. 295, 316.)

To satisfy step two's requirement of a severe impairment, the Plaintiff must provide medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. §416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20. C.F.R. § 416.929. The Commissioner has passed regulations which guide dismissal of claims at step two. Those regulations state an impairment may be found to be not severe *only* when evidence establishes a "slight abnormality" on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ must consider the combined effect of all of the claimant's impairments on the ability to function, without regard to whether each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991).

1 The step two inquiry is a *de minimis* screening device to dispose of
2 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,
3 153-154.²

4 Where drug or alcohol addiction is a consideration, the
5 Commissioner must evaluate severity with and without the effects of
6 substance addiction. *Bustamante*, 262 F.3d at 955. Here, the record
7 includes reports from various examining and reviewing psychologists
8 and Plaintiff's mental health counselor that diagnose anxiety, panic
9 and depressive disorders and/or indicate severe and marked
10 limitations these impairments. (Tr. 210, 212, 275, 295, 309, 517.)
11 The ALJ rejected these opinions because they did not "consider the
12 claimant's alcohol addiction" or because the record showed Plaintiff
13 was drinking at the time of the assessments. (Tr. 26.) As
14 discussed below, this is error, as the Regulations require an
15 initial evaluation of impairments with the effects of alcoholism.
16 *Id.*; see also *Salazar*, 468 F.3d 615, 626 (9th Cir. 2006).

17 **B. Sequential Evaluation in the Context of Substance Addiction**

18 The Contract with America Advancement Act of 1996 amended the
19 Social Security Act, providing that "an individual shall not be
20 considered to be disabled . . . if alcoholism or drug addiction
21 would . . . be a contributing factor material to the Commissioner's
22

23 ²A mental impairment generally is considered non-severe for
24 purposes of step two if the degree of limitation in the three
25 functional areas of activities of daily living, social functioning,
26 and concentration, persistence or pace is rated as "none" or "mild"
27 and there have been no episodes of decompensation. 20 C.F.R. §§
28 404.1520a(d)(1), 416.920a(d)(1).

1 determination that the individual is disabled." 42 U.S.C.
2 423(d)(2)(C). Special statutes and regulations govern disability
3 claims that involve substance abuse.

4 Under the Regulations implemented by the Commissioner, the ALJ
5 must follow a specific analysis that incorporates the sequential
6 evaluation discussed above. 20 C.F.R. § 404.1535(a), 416.935(a).
7 The ALJ must conduct the five-step inquiry without attempting to
8 determine the impact of substance addiction. If the ALJ finds that
9 the claimant is not disabled under the five-step inquiry, the
10 claimant is not entitled to benefits and there is no need to proceed
11 with further analysis. *Id.* If the ALJ finds that claimant is
12 disabled, and there is evidence of substance abuse, the ALJ should
13 proceed under the sequential evaluation and §§ 404.1535 or 416.935
14 to determine if the claimant would still be disabled absent the
15 substance abuse. *Bustamante*, 262 F.3d at 955.

16 In support of his argument that alcoholism is not material to
17 his mental disability, Plaintiff cites an emergency teletype sent
18 out by the Commissioner that addressed questions on the application
19 of the new law when a claimant has mental impairments in addition to
20 substance addiction. In *Salazar v. Barnhart*, the Ninth Circuit
21 quoted the teletype with approval in its analysis of a substance
22 addiction case, stating, "[the teletype] stresses the need for
23 careful examination of periods of abstinence and also directs that
24 if the effects of claimant's mental impairments cannot be separated
25 from the effects of substance abuse, the DAA [drug and alcohol
26 abuse] is *not* a contributing factor material to the disability
27 determination." *Salazar*, 468 F.3d at 623. The referenced teletype
28

1 addressed the interplay between substance abuse and mental
2 impairments as follows:

3 We know of no research data upon which to reliably predict
4 the expected improvement in a coexisting mental
5 impairment(s) should drug/alcohol abuse stop. The most
6 useful evidence that might be obtained in such cases is
7 that relating to a period when the individual was not
8 using drugs/alcohol. Of course, when evaluating this type
9 of evidence consideration must be given to the length of
10 the period of abstinence, how recently it occurred, and
whether there may have been any increase in the
limitations and restrictions imposed by the other mental
impairments since the last period of abstinence. When it
is not possible to separate the mental restrictions and
limitations imposed by DAA and the various other mental
disorders shown by the evidence, a finding of "not
material" would be appropriate.

11 *Id.* (Citing *Cox, Dale, Social Security Administration, Emergency*
12 *Teletype, August 30, 1996, available at www.ssas.com/daa-q&a.htm;*
13 *see also McGoffin v. Barnhart*, 288 F.3d 1248, 1253 (10th Cir. 2002)
14 (*citing the Social Security Administration's teletype*).

15 Nonetheless, Plaintiff still has the burden of proving his
16 alcoholism is not a contributing factor material to a disability
17 finding. *Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).
18 Plaintiff must provide competent evidence of a period of abstinence
19 and medical source opinions relating to that period sufficient to
20 establish his alcoholism is not a contributing factor material to
21 his alleged mental impairments.

22 On remand, the ALJ will conduct a new sequential evaluation,
23 applying the standards and procedures in evaluating the medical
24 evidence with and without the effects of substance abuse. If, at
25 steps two and three, she determines Plaintiff is disabled under
26 Listing 12.09 and an appropriately referenced mental impairment, she
27 is required to conduct another sequential evaluation to "separate
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1 out" non-substance abuse impairments and determine if Plaintiff
2 would be disabled even if he stopped abusing alcohol. *Id.*
3 Plaintiff may submit additional records covering the time period at
4 issue, including drug testing results, if available, from Grant
5 County Prevention and Recovery Center (PARC) and law enforcement,
6 documenting alleged periods of abstinence.

7 **CONCLUSION**

8 The ALJ's steps two and three findings that Plaintiff is
9 disabled under 12.09 and 12.05 are based on legal error and not
10 supported by substantial evidence. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
13 **GRANTED**. This matter is remanded to the Commissioner for additional
14 proceedings pursuant to sentence four of 42. U.S.C. § 405(g);

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
16 **DENIED;**

17 3. An application for attorney fees may be filed by separate
18 motion.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Plaintiff and the file shall be **CLOSED**.

22 DATED January 24, 2007.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
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